

No. 16571✓

United States
Court of Appeals
for the Ninth Circuit

LOUIE MILLER,

Appellant,

vs.

ARTHUR S. FLEMING, Secretary of Health,
Education and Welfare,

Appellee.

Transcript of Record

FILED

OCT 12 1959

PAUL P. O'BRIEN, CLERK

Appeal from the United States District Court for the
Southern District of California
Central Division

No. 16571

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Court of Appeals
for the Ninth Circuit

LOUIE MILLER,

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[Clerk's Note: When deemed likely to be of an important nature errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

HILL, FARRER & BURRILL,
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For Appellee:

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief, Civil Division;

JOHN T. ALLEN,
Assistant U. S. Attorney,
600 Federal Building,
Los Angeles 12, California.

In the United States District Court for the Southern
District of California, Central Division

No. 1174-58-BH

LOUIE MILER,

Plaintiff,

vs.

ARTHUR S. FLEMING, Secretary of Health,
Education and Welfare, *

Defendant.

PETITION FOR REVIEW OF
ADMINISTRATIVE ORDER

To the Honorable Judges of the United States
District Court for the Southern District of
California, Central Division:

The petition of Louie Miller respectfully shows
to the Court as follows:

1. This petition is filed to review an order of the Appeals Council of the Department of Health, Education and Welfare, Social Security Administration. Jurisdiction is conferred by virtue of §405(g) Title 42, United States Code (§205(g) of the Social Security Act, as amended). The final decision of the Secretary of the Department of Health, Education and Welfare was made on October 17, 1958, and notice of such decision was mailed to Petitioner on said date. Petitioner is a resident of the City of Los Angeles, County of Los

Angeles, State of California, and does reside within this judicial district. [2*]

2. On April 9, 1957, Petitioner filed an application for old age insurance benefits with the Department of Health, Education and Welfare, Social Security Administration. On May 24, 1957, it was determined that Petitioner was not entitled to old age insurance benefits for which he applied. A copy of said ruling is attached hereto, marked Exhibit "A" and incorporated herein.

Petitioner appealed this determination. The appeal was heard before a referee in bankruptcy of the Old Age and Survivors Insurance, Social Security Administration Department of Health, Education and Welfare. Petitioner appeared and participated in said hearing before the said referee on March 26, 1958.

On May 5, 1958, the referee's decision was made and entered that Petitioner is not entitled to the old age benefits, for which Petitioner made application. The referee held that Petitioner's income from the City of Los Angeles during 1955 and 1956 for work as a consultant was earned in an employer-employee relationship and did not constitute earnings from self-employment for which Petitioner could be credited with quarters of coverage within the meaning of the Social Security Act, as amended.

A copy of the referee's decision is attached

*Page numbering appearing at foot of page of original Certified Transcript of Record.

hereto, marked Exhibit "B," and incorporated herein.

A request for review of the referee's decision was filed July 1, 1958. On October 17, 1958, petitioner's request for review of the referee's decision was denied by the Office of Appeals Council, Social Security Administration, Department of Health, Education and Welfare. A copy of the said denial of request for review is attached hereto as Exhibit "C," and incorporated herein. Petitioner's request for review having been denied, the referee's decision stands as the final administrative decision on Petitioner's claim. [3]

3. Petitioner requests review of the administrative order determining that Petitioner is not entitled to old age insurance benefits.

Wherefore, Petitioner prays that the decision and order of the Office of Appeals Council, Social Security Administration Department of Health, Education and Welfare denying Petitioner old age insurance benefits, for which Petitioner has made application be set aside and annulled and that this Court find, upon review, that Petitioner is eligible to receive old age insurance benefits, for which Petitioner has made application and for such other and further relief as to the Court may seem just and proper.

HILL, FARRER & BURRILL,

By /s/ RAY L. JOHNSON, JR.,

Attorneys for Petitioner. [4]

EXHIBIT A

Always give Claim No. 554-50-7961-A when writing about your claim.

Department of
Health, Education, and Welfare
Social Security Administration
Bureau of Old-Age and Survivors Insurance
Area Office, San Francisco, Calif.
District Office, 836 S. Figueroa St., Los Angeles
17, Calif.

May 24, 1957.

Louie Miller
280 S. Burlington Ave.
Los Angeles 57, Calif.

This notice refers to your claim for benefits under Title II of the Social Security Act. Our records show that you are not now entitled to old-age insurance benefits.

The Social Security Act provides for payment of old-age insurance benefits to a person who is fully insured. To be fully insured you must have 6 quarters of coverage. A quarter of coverage is a calendar quarter in which the person has been paid \$50 or more in wages. After 1954 if the wages are for agricultural labor, a quarter of coverage is credited for each \$100 in cash wages paid in a calendar year. After 1950, a quarter of coverage may be earned by self-employed persons whose self-employment income in a taxable year is at

least \$400. No more than 4 quarters of coverage may be credited in a calendar year.

Our records show that you have 0 quarters of coverage. When you have the necessary quarters for an insured status, you may again file application for benefits.

If you do not agree with this determination, you may request us to reconsider your claim or you may request a hearing before a referee of the Social Security Administration. Additional evidence is not required, but if new evidence is available it should be submitted with your request for reconsideration or hearing. A request for a reconsideration or a hearing should be made promptly, and must be filed within 6 months from the date of this notice.

If you have any questions about your claim, you should get in touch with the Social Security Administration district office shown above. If you call in person, please give this notice to the district office representative.

/s/ JOSEPH C. COLUMBUS,
Chief, Area Office. [5]

Amounts for 1955 and 1956 could not be included because these amounts were earned in an employer-employee relationship. Such amounts cannot be counted toward your social security.

A report will be forwarded to the district director of internal revenue with whom you filed your tax return, so that refund of self-employment taxes paid on these amounts may be made to the extent permitted by the Internal Revenue Code. [6]

EXHIBIT B

Form AC-514

Department of
Health, Education, and Welfare
Social Security Administration
Office of Appeals Council

REFEREE'S DECISION

In the case of
LOUIE MILLER,
Claimant,
LOUIE MILLER,
Wage Earner.

(Social Security Account number: 554-50-7961.)

Case No. LA-1552

Claim for Old-Age Insurance Benefits

This case is before the referee on request of claimant, Louie Miller, for a hearing appealing a determination by the Bureau of Old-Age and Survivors Insurance, Social Security Administration, Department of Health, Education and Welfare, that he is not entitled to old-age insurance benefits for which he applied. A hearing at which claimant appeared and participated in was held in Glendale, California, on March 26, 1958.

On April 9, 1957, claimant filed an application for old-age insurance benefits alleging that he had self-employment income derived from work per-

formed as a consultant to the City of Los Angeles, California, during 1955 and 1956. In reaching its determination the Bureau found that claimant's income from the City of Los Angeles during 1955 and 1956 for his work as a consultant was earned in an employer-employee relationship and did not constitute earnings from self-employment for which he could be credited with quarters of coverage within the meaning of the Social Security Act, as amended (herein called the Act).

The general issue in this case is whether claimant has the necessary quarters of coverage for a fully insured status entitling him to old-age insurance benefits. The resolution of that issue depends upon whether claimant's income for the performance of his work as a consultant to the City of Los Angeles constitutes earnings from self-employment or represents wages received as an employee of the city within the meaning of the Act. If said income is found not to be earnings from self-employment, then it is income from non-covered employment and claimant lacks the necessary quarters of coverage which would entitle him to old-age insurance benefits. [7]

With respect to income from self-employment, section 211(a) of the Act, in pertinent part, provides that the term "net earnings from self-employment" means the gross income derived by an individual from any trade or business carried on by such individual, less the deductions allowed which are attributable to such trade or business.

Section 211(c) further defines the term "trade or business" when used with reference to self-employment income or net earnings from self-employment as excluding the performance of services by an individual as an employee. Section 210(k) (2) of the Act defines an employee as anyone who has the status of an employee under the common law rules applicable in determining the employer-employee relationship.

The record shows that claimant, who was born on February 20, 1885, had been employed by the Bureau of Street Maintenance of the City of Los Angeles (herein called the Bureau) for a period of approximately fifty years prior to March, 1955. During the latter part of his employment he had been the director of the Bureau, which was charged with the maintenance, repair, and clearance of the streets of the city, and had supervised its activities and personnel. As director of the Bureau he was also required to make a large number of inspection trips throughout the city. At the end of February, 1955, claimant was "retired" under the City Employees Retirement Plan¹ because he had attained

¹The charter of the City of Los Angeles which sets forth the conditions for retirement in section 508 also specifically provides:

No person who shall have been retired from the services and employment of the City of Los Angeles pursuant to the provisions of this article shall thereafter be paid for any services rendered as an officer or employee of said city except for services rendered as an election officer or as an officer elected by the electors of said city.

the compulsory retirement age and he was replaced by a new director who had previously been his assistant.

On February 23, 1955, claimant entered into a personal service contract (which appears to have been properly authorized) with the City of Los Angeles whereby he was engaged as a consultant to the city for the period commencing with the date of the contract and terminating on June 20, 1956. The contract provided, *inter alia*:

The city hereby contracts with the contractor for, and contractor agrees to furnish, investigations as to lot cleaning, street repairs, equipment selection and use, and any other matters which may be determined and specified by the Board of Public Works of the city, and to give his expert advice and written reports thereon to the Board of Public Works of the city as herein provided. [8]

In addition, the contract also provided that claimant was to be paid the sum of \$6400 in four equal installments of \$1600 every four months upon the submission to, and approval by, certain members of the Board of Public Works, of reports detailing the services performed during the period. He was also required to insure the city against claims which might arise from the use of his automobile on city business and to itemize his travel expenses by automobile on field trips for which he was to be reimbursed by the city.

Claimant testified that in his capacity as consultant, he was required to consult with city officials such as councilmen, etc., whereas previously he had consulted only with members of the Board of Public Works, who in turn consulted with said city officials, that he also continued to consult with the Board of Public Works as did his successor, that he was no longer responsible for the operations of the Bureau and was not concerned with supervising its activities or personnel except when consulted, that he was subject to assignments by the Board of Public Works to inspect specific jobs involving street repairs and related matters and to make recommendations therein, and that to this extent his duties were an integral part of the Bureau.

Claimant testified further, that although he was free to undertake and perform work for the public, he had devoted himself exclusively to his position as consultant to the city during the term of the contract, working four days per week from 9 a.m. to 3:30 p.m., that he had no expenses in the performance of his duties, that the city provided him with desk space in an office, other than he had previously occupied, and supplied him with telephone service, stationery, secretarial services, and automobile parking space, all of which had been previously furnished to him when employed as the director of the Bureau, that he had no private telephone listing or business cards, and that he did not advertise or secure listings in trade journals

or magazines for the purpose of obtaining work in addition to that secured by him from the city.

The record also reveals that claimant was to perform the services personally, that he did not have helpers, that he was permitted to work for others, that his work was done on city premises, that the city did not require him to work during fixed hours or at certain times, that he was not given instructions about the way the work was to be done, that he was not required to produce a certain amount of work regularly, and that the city had first call on his services.

Claimant completed his work pursuant to his contract with the city and was compensated in accordance with its provisions. Since that time he has not engaged in any gainful activities. In filing his income tax reports for 1955 and 1956 claimant reported his income for his consulting work to the city as self-employed earnings. [9]

After carefully reviewing all the evidence, the referee finds claimant was engaged as an employee by the City of Los Angeles within the meaning of the Act during the period in issue. It is apparent that he was engaged to continue working for the city because of his intimate knowledge of the procedures and operations of the Bureau and the Board of Public Works, rather than because of his general knowledge as a professional consultant who seeks work as an independent contractor. His new work involved the same subject matter on which

he had previously worked and included substantially the same duties. Although he was relieved of his supervisory duties for the Bureau, he nevertheless, indirectly participated in these duties by frequently consulting with his successor concerning them. Also his new duty involving consultations with city officials, other than and in addition to those with whom he had previously consulted, was not substantially different from his former work. It, in effect, served to relieve members of the Board of Public Works from performing this task as they had previously done after being briefed by claimant.

The city furnished all the facilities necessary for the performance of his work except for an automobile for the use of which he was reimbursed by the city. He was required to perform his services personally and did not have helpers. He was subject to assignments by the Board of Public Works to inspect specific jobs and to report his recommendations. The city had first call on his services but, apparently, would not object if he worked for others as long as it did not interfere with his city work. He worked practically full time for the city and did not hold himself out as available to perform services for others, nor did he seek such work. Although it appears that he was not supervised in the performance of his work and that his working time was not regulated, he, nevertheless, was required to report periodically to the Board of Public Works and to obtain its approval of his services performed before becoming entitled to compensation. This in-

dicates that the city retained a substantial measure of control over his services. Moreover, his long experience and proficiency on the job could readily account for the unregulated manner in which he was permitted to perform his work.

Thus, it appears that this is not the type of case in which an individual is engaged in the independent business of rendering advisory consultant services from time to time on a subject-to-call basis, or that the work which he was regularly called upon to perform was of a nature which would require the services of one usually engaged in an independent calling or profession. It appears rather that his services were in a real sense integrated in the work of the city and constituted a definite part of the work of the Bureau and the Board of Public Works, which are charged with the responsibility to maintain and repair the city streets. It further appears that the work performed by claimant [10] could have been handled by a regular employee of the city. Although a considerable amount of experience and ability was necessary in the performance of his services, it was no greater than previously required of him. To a large extent his activities appear to have promoted the interests of the city in much the same manner as his services prior to "retirement." Furthermore, claimant's compensation did not depend upon the completion of a specified amount of work or the accomplishment of a prescribed result. He was paid a fixed amount like any

other employee, with no opportunity to make a profit or suffer a loss under his arrangement.

The fact that the city charter forbid the re-employment of retired employees as employees does not, per se, establish a relationship of an independent contractor if, in fact, the relationship between claimant and the city was one of employer and employee within the meaning of the Act. Thus, in *Matcovich vs. Anglin*, 134 F. 2d 834 (C.A.9), the court held that a local law (California Unemployment Reserves Act) which stated that a dance hall proprietor who employed taxi dancers was not their "employer" and a state court decision to the same effect, were not controlling in determining whether the proprietor was an "employer" within the meaning of the Social Security Act, and that the status of the dance hall proprietor as an "employer" was to be determined under applicable common-law principles.

The referee, therefore, finds that notwithstanding the city's charter provisions and claimant's designation in the contract as a contractor, the entire factual circumstances indicate that his services were those of an "employee" within the meaning of section 210(k) (2) of the Act, and concludes that claimant was an employee of the city within the meaning of the Act, engaged in non-covered employment which did not qualify him to be credited with any of the claimed quarters of coverage.

Accordingly, it is the decision of the referee that claimant is not entitled to the old-age insurance benefits for which he made application.

Date: May 5, 1958.

/s/ WILLIAM W. KAPPELL,
Referee. [11]

EXHIBIT C

Form AC-518

Department of
Health, Education, and Welfare
Social Security Administration
Office of Appeals Council

DENIAL OF REQUEST FOR REVIEW

In the case of

LOUIE MILLER,

Claimant,

LOUIE MILLER,

Wage Earner.

Social Security Acc't. No. 554-50-7961

Case No. LA-1552

Claim for Old-Age Insurance Benefits

Decision of Referee William W. Kapell

Dated May 5, 1958

This case is before the Appeals Council upon request of the claimant for review of the referee's

decision rendered in the captioned case. After careful examination of this matter, we are of the opinion that a formal review of the referee's decision would result in no advantage to the claimant; therefore, the Request for Review is hereby denied.

Dated: October 17, 1958.

OFFICE OF APPEALS
COUNCIL,

/s/ JOSEPH E. McELVAIN,
Chairman.

Duly verified.

[Endorsed]: Filed December 16, 1958. [12]

[Title of District Court and Cause.]

ANSWER

The defendant, Arthur S. Flemming, Secretary of Health, Education, and Welfare, for answer to the Complaint herein designated "Petition for Review of Administrative Order," admits, denies, and alleges as follows:

I.

The defendant admits the allegations of Paragraph I of the Complaint, except that he states that Section 205(g) of the Social Security Act, 42 U.S.C.A. 405(g), provides for bringing an action to review a final decision of the defendant, which defendant states was in this case a decision rendered on May 5, 1958, by a referee in the Office of Appeals Council, Social Security Administration, in

the Department of Health, Education, and Welfare, which became the defendant's final decision upon denial by said Appeals Council, on October 17, 1958, of the plaintiff's request for a review of such decision. [14]

II.

The defendant admits the allegations of Paragraph 2 of the Complaint, including the unnumbered subparagraphs thereof, except that defendant states that the hearing referred to therein was held by, and the decision of May 5, 1958, was rendered by, a referee of the Office of Appeals Council in the Social Security Administration, Department of Health, Education, and Welfare, and not by a "referee in bankruptcy" as alleged by the plaintiff.

III.

Answering the allegations of Paragraph 3 of the Complaint, the defendant states that said paragraph consists of only a request for review by this court, and therefore, needs no answer.

IV.

Further answering, the defendant states that the plaintiff has no claim upon which relief can be granted, as is shown by the pertinent provisions of the Social Security Act, as amended; by the Regulations of the Social Security Administration promulgated thereunder; by the Transcript of Record upon which the decision complained of was made; and by the findings and conclusions of the defendant therein.

V.

Further answering, the defendant states that the findings of fact made by the defendant are supported by substantial evidence and thus are conclusive under the Social Security Act, as amended.

VI.

In accordance with the provisions of Section 205(g) of the Social Security Act as amended, 42 U.S.C.A., 405(g), the defendant files herewith as part of this Answer a certified copy of the Transcript of Record, including the evidence upon which the findings and decision complained of are based.

Wherefore, the defendant prays for a judgment dismissing the Complaint with costs and disbursements, and for a judgment [15] affirming the decision complained of, in accordance with Section 205(g) of the Social Security Act, as amended, 42 U.S.C.A. 405(g).

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ JOHN T. ALLEN,
Attorney, Civil Division, Department of Justice,
Attorneys for Defendant.

Certificate of Service by Mail attached.

[Endorsed]: Filed April 1, 1959. [16]

In the United States District Court, Southern
District of California, Central Division

No. 1174-58—BH

LOUIE MILLER,

Plaintiff,

vs.

ARTHUR S. FLEMING, Secretary of Health,
Education and Welfare,

Defendant.

ORDER AND JUDGMENT
OF AFFIRMANCE

Plaintiff brings this petition under 42 U.S.C. §405(g) to review the final decision of defendant rendered upon the denial by the Appeals Council of Social Security Administration on October 17, 1958, to review the referee's decision of May 5, 1958, which determined that plaintiff was not entitled to old age insurance benefits under Title II of the Social Security Act. Upon a review of the pleadings and transcript of the record, it is my view that the findings of fact are supported by substantial evidence and therefore conclusive. This court is not concerned with any subterfuge of the City of Los Angeles to avoid the provisions of the City Charter. The decision of defendant that plaintiff's income from the City of Los Angeles during 1955 and 1956, for his work as a consultant, was earned in an employer-employee relationship and did not constitute earnings from self-employment for which he could

be credited [115] with quarters of coverage within the meaning of the Social Security Act should be and is hereby affirmed. Inasmuch as I heard the case on its merits, it is unnecessary for me to pass upon the motion for summary judgment and said motion is therefore denied. Costs taxed, \$20.00.

Dated: This 26th day of May, 1959.

/s/ BEN HARRISON,
Judge.

[Endorsed]: Filed May 26, 1959.

Entered May 27, 1959. [116]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED
STATE COURT OF APPEALS FOR THE
NINTH CIRCUIT

Notice is hereby given that Louie Miller, plaintiff-appellant in the above cause, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order and Judgment of this Court entered on May 27, 1959, affirming the order of the defendant-appellee, denying plaintiff-appellant old age insurance benefits under Title II of the Social Security Act.

HILL, FARRER & BURRILL,

By /s/ RAY L. JOHNSON, JR.,
Attorneys for Plaintiff-
Appellant.

[Endorsed]: Filed July 8, 1959. [117]

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the foregoing documents together with the other items, all of which are listed below, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case; and that said items are the originals unless otherwise shown on this list:

Names and Addresses of Attorneys.

Petition for Review of Administrative Order, filed 12/16/58.

Answer of Defendant, filed 4/1/59.

Certified copy of transcript of record of proceedings had before Office of Appeals Council, Social Security Administration, etc.

Order and Judgment of Affirmance, entered 5/27/59.

Notice of Appeal, filed 7/8/59.

Designation of contents of record on appeal, filed 7/8/59.

Certificate of Service re appeal papers, filed 7/8/59.

Dated: August 6, 1959.

[Seal] JOHN A. CHILDRESS,
Clerk.

By /s/ WM. A. WHITE,
Deputy Clerk.

In the United States Court of Appeals
For the Ninth Circuit

No. 16571

LOUIE MILLER,

Appellant,

vs.

ARTHUR S. FLEMING, Secretary of Health,
Education and Welfare,

Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY

1. Appellant was an independent contractor and not an employee as a matter of law.
2. Appellant was an independent contractor and not an employee as a matter of fact.
3. The decision of Appellee is not supported by substantial evidence on the record as a whole.

HILL, FARRER & BURRILL,

By /s/ RAY L. JOHNSON, JR.,
Attorneys for Appellant.

Certificate of Service by Mail attached.

[Endorsed]: Filed August 17, 1959.

[Endorsed]: No. 16571. United States Court of Appeals for the Ninth Circuit. Louie Miller, Appellant, vs. Arthur S. Fleming, Secretary of Health, Education and Welfare, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed August 7, 1959.

Docketed: August 12, 1959.

PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

